



1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some  
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the  
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from  
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the  
7 institution and the net deposits in the applicant’s account for the six months prior to the date of  
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been  
9 at the institution for less than six months, “the certificate must show the account’s activity for  
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount  
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an  
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly  
14 deposits or the average monthly balance for the six-month period immediately preceding the  
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,  
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s  
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody  
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time  
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the  
21 last six months was \$ and his average monthly deposits were \$0.

22 Plaintiff’s application to proceed IFP should be granted. Plaintiff should not be required  
23 to pay an initial partial filing fee because his account balance is \$0; however, whenever his

1 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the  
 2 preceding month's income credited to his account until the \$350 filing fee is paid.

## 3 II. SCREENING

### 4 **A. Standard**

5 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time  
 6 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--  
 7 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)  
 8 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
 9 § 1915(e)(2)(A), (B)(i)-(iii).

10 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if  
 11 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in  
 12 which a prisoner seeks redress from a governmental entity or officer or employee of a  
 13 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify  
 14 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--  
 15 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks  
 16 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
 18 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and  
 19 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a  
 20 complaint under these statutes, the court applies the same standard as is applied under Rule  
 21 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule  
 22 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232  
 23 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most  
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,  
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less  
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9  
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
7 action," it must contain factual allegations sufficient to "raise a right to relief above the  
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]  
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a  
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at  
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the  
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

## 17 **B. Plaintiff's Complaint**

18 In the caption of the complaint, Plaintiff names the State of Nevada, Juvenile Foster  
19 Home Placement, Child Protection Services, and Jane/John Doe Foster homeowner. (ECF No. 1-  
20 1 at 1.) In the body of the complaint, he names Jane Doe foster parent, and John Doe, who is the  
21 foster parent's son. (ECF No. 1-1 at 2.) Plaintiff raises concerning allegations about being  
22 physically and sexually abused by Jane and John Doe while he was a foster child in their home.  
23

1 He alleges that John and Jane Doe were acting under color of state law because they were  
2 the assigned foster family by the State.

3 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive rights  
4 conferred by the Constitution and federal statutes. Section 1983 “is not itself a source of  
5 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
6 conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation  
7 omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her civil rights  
8 were violated, (2) by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42,  
9 48-49 (1988). To adequately plead the section 1983 elements, a complaint must identify what  
10 constitutional right each defendant violated, and provide sufficient facts to plausibly support  
11 each violation. *See e.g., Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (noting defendants  
12 must personally participate in misconduct to be liable under section 1983).

13 The State of Nevada and its agencies are not persons that may be sued under section  
14 1983, and furthermore, they may not be sued in federal court because of sovereign immunity  
15 under the Eleventh Amendment. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989);  
16 U.S. Const. amend XI. Therefore, the State of Nevada and its Juvenile and Foster Home  
17 Placement and Child Protective Services agencies should be dismissed with prejudice.

18 Generally, private parties are not considered as acting under color of state law and subject  
19 to suit under section 1983. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). Neither  
20 the Supreme Court nor the Ninth Circuit (in a published decision) has held that merely serving as  
21 a foster parent/family transforms a private party from a state actor for purposes of section 1983.  
22 The Ninth circuit did hold in an unpublished decision that “[m]erely serving as a foster parent  
23 does not transform a private party into a state actor.” *Ismail v. County of Orange*, 693 Fed.Appx.

507, 512 (9th Cir. 2017) (citations omitted), *cert. denied* 138 S.Ct. 1329 (Mar. 26, 2018). Other circuits that have confronted the issue have also determined that being appointed as a foster parent/family does not make a private party a state actor. *See United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("[F]oster parents are generally not considered agents of the state."); *Leshko v. Servis*, 423 F.3d 337, 347 (3d Cir. 2005) (foster parents are not state actors under section 1983); *Rayburn ex. Rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (same); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 392 (4th Cir. 1990) ("[H]arm suffered by a child at the hands of his foster parents is not harm inflicted by state agents."); *K. H. Through Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990).

The court concurs with this reasoning and finds that being assigned or appointed a foster parent/family by a state does not transform a private party into a state actor. Therefore, Plaintiff also does not state a claim under section 1983 against the John and Jane Doe defendants.

In sum, this action should be dismissed with prejudice, and the motion for appointment of counsel should be denied as moot.

### **III. RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff should not be required to pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he is required to make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be directed to **SEND** a copy of an order adopting and accepting this Report and

1 Recommendation to the attention of **Chief of Inmate Services for the Nevada**  
2 **Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

3 (2) The complaint (ECF No. 1-1) should be **FILED**.

4 (3) The action should be **DISMISSED WITH PREJUDICE**, and the motion for  
5 appointment of counsel (ECF No. 1-2) should be **DENIED AS MOOT**.

6 The Plaintiff should be aware of the following:

7 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
8 this Report and Recommendation within fourteen days of being served with a copy of the Report  
9 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
10 Report and Recommendation" and should be accompanied by points and authorities for  
11 consideration by the district judge.

12 2. That this Report and Recommendation is not an appealable order and that any notice of  
13 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
14 until entry of judgment by the district court.

15  
16 Dated: March 25, 2020

17 

18 William G. Cobb  
19 United States Magistrate Judge  
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22  
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